Supreme Court, U.S.
FILED
951952 APR 23 1996
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ROBERT FUKUTOMI, Petitioner,

v.

UNITED STATES TRUSTEE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a bankruptcy court have the power to order the appointment of a Chapter 11 trustee, sua sponte, and without providing procedural safeguards for a fair hearing?

2. Does a bankruptcy court deny due process of law by ordering the appointment of a Chapter 11 trustee, sua sponte, without prior notice to parties in interest or an opportunity for such parties to present a meaningful opposition?

LIST OF PARTIES

The parties who participated in the proceedings in the District Court and Court of Appeals were Robert Fukutomi, the United States Trustee for the Central District of California, and IDBI Managers, Inc., as agent for Fireman's Insurance Fund of Newark, NJ ("IDBI"). IDBI filed briefs and participated as appellee in both the District Court and the Court of Appeals. IDBI is not, however, named in the caption of the Court of Appeal opinion and is not at this time a creditor of the bankruptcy debtor, Bibo, Inc., having withdrawn its claim. Because IDBI is no longer a party in interest, IDBI is not named in the Petition.

The parties to the Petition are:

Party	Attorney
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United States Trustee for Central District of California Marcia J.K. Tiffany	Solicitor General to the United States Room 5614, Dept. of Justice 10th St. & Constitution Ave. Washington, D.C. 20530

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IN THE
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October Term, 1995

ROBERT FUKUTOMI, Petitioner,

v.

UNITED STATES TRUSTEE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

The Petitioner, Robert Fukutomi ("Petitioner"), respectfuily prays that the Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 24, 1996.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 76 F.3d 246 and is reprinted in the Appendix hereto at pg. A-1.

The Memorandum of Opinion of the District Court, Central District of California, by the Honorable Harry L. Hupp, has not been reported and is reprinted in the Appendix hereto at pg. A-10.

The Order Directing United States Trustee to Appoint Chapter 11 trustee has not been reported and is reprinted in the Appendix hereto at pg. A-16.

JURISDICTION

The proceeding below involved a final order directing the United States Trustee to appoint a Chapter 11 trustee, entered in a bankruptcy reorganization case filed under Chapter 11 of the United States Bankruptcy Code. Petitioner invoked the appellate jurisdiction of the District Court, pursuant to 28 U.S.C. § 158, to review the order of the Bankruptcy Court.

The District Court affirmed the order of the Bankruptcy Court and appeal was taken to the Court of Appeal, Ninth Circuit, which entered a judgment and opinion affirming the lower court on January 24, 1996. No Petition for Rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 105(a)

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 1104(a)

At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any

equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

STATEMENT OF CASE

On May 26, 1993, in the case entitled In re Bibo, Inc., the Bankruptcy Court, the Honorable Robin L. Riblet, presiding, sua sponte entered an order directing the United States Trustee to appoint a Chapter 11 trustee, during a hearing unrelated to the appointment of a Chapter 11 trustee. No prior notice was given to the parties that on May 26, 1993, the Bankruptcy Court would take this action. Before the announcement by the Bankruptcy Judge of her intentions, no one, except the Bankruptcy Judge, knew what she intended to do, or the factual allegations underlying that action.

Bibo, Inc. owned and managed apartment complexes and had filed a voluntary Chapter 11 bankruptcy case on August 7, 1993. On May 26, 1993, a hearing had been set, at the request of the Office of the United States Trustee, upon Bibo's request for Principal Compensation for Petitioner, the President of Bibo and his daughter, Amy Fukutomi. Creditors and other parties in interest had been very active in participating in the case, and this hearing was no different. Six separate sets of objections were filed concerning the principal compensation request. No other hearing had been set in the Debtor's Chapter 11 case for the

same date and time.[1]

No oral or written motion was made to the Bankruptcy Court by any creditor or party in interest in the Chapter 11 case, requesting the appointment of a Chapter 11 trustee, and no papers were submitted either in favor of, or against the appointment of a trustee, at or before the hearing on principal compensation.

The Bankruptcy Court commenced the hearing on the Principal Compensation request, without giving notice that it intended to order the appointment of a trustee "sua sponte" at the hearing. Yet, the Bankruptcy Court had, prior to the hearing, had already drafted its own Order Directing the United States Trustee to Appoint a Chapter 11 trustee. In fact, the Bankruptcy Court kept its intentions hidden from the parties, until substantially well into the hearing. The first

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[1] A continued hearing was calendared in a related case, In re El Prado de Oxnard, Ltd., Bankruptcy Court case number ND 82-71698 RR, Central District of California. This continued hearing related to a motion brought by secured creditors for order appointing a trustee in the related case. The debtor in the related case was a limited partnership in which the Bibo, Inc. was the general partner. An Examiner had been appointed in the related case and recommended appointment of a trustee in the related case was based on the existence of conflicting claims between Bibo as general partner of the limited partnership, El Prado de Oxnard, Ltd. The Examiner did not find any fraud. Unfortunately, El Prado de Oxnard did not have counsel at the hearing, because he had been suspended from the practice of law just before the continued hearing.

statement by the Bankruptcy Court of her intentions to appoint a Chapter 11 trustee is not found until page 18 of the transcript of the proceedings, during an exchange between the Bankruptcy Court and counsel for the Creditor's Committee, at which time the Bankruptcy Judge stated:

> "This case has been a series of brush fires from the day it was filed. I have wondered long and hard why nobody has filed a motion to appoint a trustee in this case because I would have been favorably inclined for a long time. It has come to this particular hearing for me to draft my own order directing the U.S. Trustee to appoint a Chapter 11 Trustee. Now, I am still willing to have my mind changed. But that was what my decision was tentatively when I walked in here this afternoon.
>
> "If you would like to cross-examine Mr. Thomas and demonstrate that he is less than credible, be my guest. But based upon his declaration and the questionable goings-on in this case, it's always had an odor. It's never been so strong that I would really do something sua sponte, although I have power to do so. And no creditor in this case has ever asked for the appointment of a Chapter 11 trustee. I would have welcomed it. But this really was the straw that broke the camel's back. I'm appalled at this particular situation."

Counsel for Bibo, not knowing that he would be cross-examining anybody at that hearing, without any prior preparation that would have been necessary to have made the cross-examination effective, and having little choice, stated:

> "Given the Court's comments, I guess I'll ask Mr. Thomas to get on the stand."

Mr. Thomas, who was present in the courtroom, was thereupon called as a witness.

The Bankruptcy Court's "sua sponte" Order is based upon the facts alleged in the declaration by Mark Thomas ("Thomas Declaration"), which was included as an exhibit to one of the creditor's objections. Mark Thomas was a principal of Thomas Associates Real Estate Management Services and was hired by Bibo to manage two (2) of Bibo's apartment complexes. The Thomas Declaration alleged that Petitioner had entered into a secret agreement with Thomas. Thomas alleged that Petitioner had been involved in a "kick-back" scheme to overcharge the estate for management services. Thomas said that the market price for managing something like the Bibo complex was 2.5% to 3% of gross monthly rents. He claimed he told Petitioner that he would provide full service real estate management for the complex, which would include accounting, for 2.5%. Thomas also claimed that Petitioner told him that 2.5% "simply would not work," and that Thomas should bid the job for 5%, then pay Bibo 2.5% out of the 5%. Thomas claimed that he then prepared the management contract accordingly.

After Thomas testified, the Bankruptcy Judge asked Bibo's attorney if he had any witnesses and took a brief

recess. Upon return, Bibo's attorney said that he had evidence he wanted to present and requested a short continuance. At the conclusion of Thomas testimony, counsel for the Debtor requested a short continuance on the grounds that:

> "I did not come here to argue to motion of appointment of trustee today. I mean, I have evidence, I have documentary evidence, I'd like to put before the court. I did not bring it here today. I did not realize that we'd have witnesses on the stand and I'd like to have the change -- obviously this is a very large motion, or proceeding, that didn't start out as it's ending up. And I think, that we are in this case, I'd ask the Court for a short continuance so that I can prepare for this hearing."

The Bankruptcy Judge responded:

> "I am inclined to deny that, Mr. Ponsford, for the simple reason that this kickback issue evidences a lack of forthcoming and secretiveness, if not outright dishonesty, by the debtor in possession principal a cause I believe for removal as management of the Debtor.
>
> "Now I don't know what issues you might want to bring forward, but unless you can show that Mr. Thomas is full of hot air and none of what he said happened happened [sic], then I am not really particularly interested in

> what other wonderful things Mr. Fukutomi and Ms. Fukutomi may have done for this property. This is enough to cause me not to trust them in possession of this property in the future."

The Bankruptcy Judge there upon granted its own motion:

> "I am denying your request for a continuance, Mr. Ponsford, based upon the evidence that has been presented to me for this hearing, plus the prior evidence which I did not find sufficient in itself.[2] I would think that there has been mismanagement by the debtor in possession. And I am going to stop it now. I am hereby directing the United States Trustee, Mr. Fittipaldi, -- not the United States Trustee, but her staff attorney, -- to appoint a Chapter 11 Trustee in this case.
>
> "I am sorry, Mr. Ponsford, but that's my job, and I'm doing it."

Petitioner appealed the Bankruptcy Court's Order to the District Court, which affirmed.

In its published opinion, the Ninth Circuit affirmed the District Court.

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[2] This prior evidence was not placed upon the record by the Bankruptcy Court.

The Ninth Circuit opinion discusses three (3) legal issues, the sua sponte appointment by the Bankruptcy Judge, the factual justification and the due process denial.

The Ninth Circuit opinion addressed the sua sponte appointment by, without analysis, stating, "The statute plainly gives the bankruptcy judge the authority to appoint a trustee sua sponte." The opinion then adds, "Though we have found no circuit court authority on point, appointments sua sponte have been understood by bankruptcy courts as authorized. See In re Embrace Systems Corp, 178 B.R. 112 (Bankr.W.D.Mich.1995); Matter of Mother Hubbard, Inc., 152 B.R. 189, 197 (Bankr.W.D.Mich.1993)." (Appendix A-6)

As to the factual justification, the opinion Ninth Circuit stated:

> "The judge's well-founded findings established fraud, dishonesty, gross mismanagement, and that appointment was in the interests of the estate." (Appendix A-7)

The Ninth Circuit concluded that Petitioner had adequate notice on the basis that:

> "Fukutomi received notice, because the judge stated what she was considering doing, and he received a hearing. He was given an opportunity to cross examine Thomas, whose allegations were the basis for the appointment." (Appendix A-8)

REASONS FOR GRANTING WRIT

I. THE APPOINTMENT OF A CHAPTER 11 TRUSTEE SUA SPONTE, IS AN IMPORTANT QUESTION, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

11 U.S.C. § 1104(a) authorizes the appointment of a trustee in a Chapter 11 case, "upon the request of a party in interest or the United States Trustee."

11 U.S.C. § 1104(a) on its face, does not authorize a Bankruptcy Court to act "sua sponte" and direct the appointment of a trustee. In re Strowski (9th Cir. BAP 1989) 96 B.R. 1007.

Nonetheless, the Ninth Circuit concluded that 11 U.S.C. § 105(a), as amended in 1986, provides the Bankruptcy Court's authority to appoint a Chapter 11 Trustee "sua sponte."

The entire Ninth Circuit's analysis consists of quoting 11 U.S.C. § 105(a), then stating: "Though we have not found circuit court authority on point, appointments sue sponte have been understood by bankruptcy courts as authorized. See In re Embrace Systems Corp., 178 B.R. 112 (Bnkr.W.D.Mich.1995); Matter of Mother Hubbard, Inc., 152 B.R. 189, 197 (Bankr.W.D.Mich.1993)."[3]

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[3] Actually, since both opinions referred to were written by the same Bankruptcy Judge, the Honorable James D. Gregg of the Western District of Michigan, the Ninth (continued...)

The issue is not nearly as simplistic as the Ninth Circuit proposes.

The 1986 amendment to Section 105(a) lacks any legislative history.[4] However, a careful reading of Section 105(a), does not support the conclusion that a bankruptcy judge may take any action a party in interest could, without limitation, because there is more language to Section 105(a) than the "taking any action" phrase upon which the Ninth Circuit seems to rely. Specifically, "taking action" must be "appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." Based on a plain reading of Section 105(a), a bankruptcy court can only take action if such action is "necessary or appropriate" to "enforce or implement court orders or rules," or to "prevent an abuse of process." Other circuits have read Section 105(a)

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[3](...continued)
Circuit's use of the plural "bankruptcy courts," is probably inaccurate.

[4] [T]his insertion into the Code was done without benefit of consideration by any Congressional committee or sub-committee and without the assistance of any legislative statement as to its need or propriety. Apparently, a Senator or Senators from a particular part of the country where importuned by local bankruptcy judges to include such a provision and to help place the bankruptcy judges back into the administration of cases, from which the Code so carefully excluded them. L. King Collier on Bankruptcy, 15th Ed., ¶ 1104.01[b], Fn. 35a.

accordingly.[5]

Therefore, the action of appointing a Chapter 11 trustee cannot be accomplished by a bankruptcy court's "sua sponte" action unless it is necessary or appropriate to the express end of (1) enforcing or implementing court orders or rules, or (2) to prevent an abuse of process. Neither was involved in the Bankruptcy Court's decision, therefore, the Bankruptcy Court was without power to appoint a Chapter 11 trustee.

How did the Ninth Circuit determine that a bankruptcy court had the authority to appoint a trustee sua sponte? The Ninth Circuit said that the bankruptcy courts "understood" that they have been authorized, citing two (2) bankruptcy court opinions.[6]

But what occurred below was different. The

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[5] See In re Finney (4th Cir. 1993) 992 F.2d, 43, 45. Bankruptcy court's sua sponte reconversion of Chapter 11 case back to Chapter 7. "[S]ubjective bad faith inquiry is designed to . . . determine if petitioner's real motive is to 'abuse reorganization process.'"

[6] Both cases cited, In re Embrace, supra, and Matter of Mother Hubbard, supra, make it clear that even if authorized, due process is a paramount concern. "This judge strongly believes that the Court may [appoint a Chapter 11 trustee sua sponte] under appropriate circumstances *with requisite procedural safeguards*." Matter of Mother Hubbard, supra, at pg. 197. This issue is further visited in the next section.

Bankruptcy Court did not just raise the issue of appointment of a Chapter 11 trustee. The decision was made *in camera*, without any advanced notice or the opportunity to present meaningfully opposition.

The problems of granting a bankruptcy court plenary power to appoint a Chapter 11 trustee on its own, are obvious. The bankruptcy court now has assumed a new role where it is not just the trier of fact, but also the accuser and advocate. As one treatise puts it: "How the court will prove to itself that cause exists is an interesting question." 5 L. King, Collier on Bankruptcy ¶ 1104.1 at pg. 1104-9, Fn. 35a (15th Ed).

A bankruptcy court has this power, and can manipulate the proceedings so that there are no procedural safeguards, the court will always reach the result desired, concerning one of the most critical issues in a bankruptcy case.

> "[n]o decision in a chapter 11 case is apt to be more critical to the ultimate results achieved in the case than the court's determination to leave the debtor in possession of its assets or, in the alternative, to order the appointment of a trustee." Colliers, supra at pg. 1104-4.

When a party in interest brings a motion seeking appointment of a Chapter 11 trustee, the Bankruptcy Court may only order the appointment of a trustee after a finding of "cause," including fraud, dishonesty, or gross mismanagement of the affairs of the debtor by the current management. 11 U.S.C. § 1104(a)(1). The appointment of

a Chapter 11 trustee is an extraordinary remedy. In re Microwave Products of America, Inc. (Bkrtcy.W.D.Tenn. 1989) 102 B.R. 666, 670 ["The appointment of a trustee is the exception rather than the rule in chapter 11 cases . . ."] For this reason there is a strong presumption that the Debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee. Committee of Dalcon Shield Claimants v. A.H. Robbins, Co. (4th Cir. 1987) 828 F.2d. 239, 241. The party moving for the appointment has the burden of proof by clear and convincing evidence. In re Inosophere Clubs, Inc. (Bkrtcy.S.D.N.Y. 1990) 113 B.R. 164, 167-168.

Where the moving party fails to meet the burden of proof, no trustee is appointed. It is plain, where the burden of proof lies, is decisive of the outcome. Armstrong v. Manzo (1965) 380 U.S. 545, 551, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62. However, here, there was a clear shifting of the burden of proof without knowing what was in the Bankruptcy Judge's mind. Those who would oppose the appointment of a Chapter 11 trustee now had the burden of changing the Judge's mind, which had already reached a decision.

Without the procedural safeguards necessary to assure a fair outcome, the bankruptcy courts should not have the authority to order the appointment of a Chapter 11 trustee. The Ninth Circuit's opinion must be reviewed because it gives a bankruptcy judge power not given by the Bankruptcy Code, to appoint a Chapter 11 trustee, any limitation of due process and fair procedure.

II. THE NINTH CIRCUIT'S OPINION THAT PETITIONER WAS NOT DENIED DUE PROCESS WHEN THE BANKRUPTCY COURT ORDERED THE APPOINTMENT OF A CHAPTER 11 TRUSTEE, SUA SPONTE AND WITHOUT NOTICE, SO CONFLICTS WITH THIS COURT'S PRIOR CASES, AS TO REQUIRE THIS COURT TO EXERCISE ITS POWER OF SUPERVISION.

"The fundamental requisite of due process is the opportunity to be heard." Grannis v. Ordean (1914) 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363.

One of the clearest explanations of the relationships between notices and due process is found in this Court's opinion in Mullane v. Ventral Hanover Bank & Trust Co. (1950) 338 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865:

> An elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonable calculated, under all circumstances, to appraise interested parties of the pendency of the action and to afford them an opportunity to present their objections. The notice must be of such nature as reasonable to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. [Citations omitted.] Id. at 338 U.S. 314, 70 S.Ct. At 657.

This Court later explained that "[t]he purpose of notice under the Due Process Clause is to appraise the affected individuals of, and permit adequate preparation of, an impending 'hearing.'" Memphis Light, Gas & Water Division v. Craft (1978) 436 U.S. 1, 14 98 S.Ct. 1554, 1563 56 L.Ed. 30 [footnote omitted].

For the right to be heard to have any significance, the "opportunity [to be heard] . . . must be granted at a meaningful time and in a meaningful manner." Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed. 2d 262; Armstrong v. Manzo (1965) 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. Holt v. Commonwealth of Virginia (1965) 381 U.S. 131, 136, 85 S.Ct. 1375, 1378, 14 L.Ed. 290.

While questions frequently arise as to the adequacy of notice or the particular form of notice, here there was no prior notice whatsoever, despite being expressly required by the Bankruptcy Code.

11 U.S.C. § 1104(a) provides:

> "At any time after the commencement of the case but before confirmation of a plan on request of a party in interest or the United

States Trustee and ***after notice and a hearing***, the Court shall order the appointment of a Trustee . . . ."

"The code defines 'after notice and a hearing' and similar phrases to mean such notice and opportunity for a hearing as appropriate in the particular circumstances. Section 102(1). Similarly, as the parties recognize, due process is a flexible concept that calls for such protection as the situation demands." In re Wade (9th Cir. B.A.P. 1990) 115 B.R. 222, 229, aff'd 948 F.2d 1122, citing Morrissey v. Brewer (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d. 484.

Federal Rules of Bankruptcy Procedure, Rule 2007.1(a) provides:

"In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner pursuant to § 104(a) . . . shall be made in accordance with Rule 9014."

Federal Rules of Bankruptcy Procedure, Rule 9014 provides in relevant part:

"In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and ***reasonable notice and opportunity for a hearing shall be afforded the party against whom relief is sought*** . . . ."

The Ninth Circuit stated in its opinion that, "Fukutomi received notice, and he received a hearing. He was given an opportunity to cross examine Thomas, whose allegations were the basis for the appointment." (Emphasis added, at Appendix, pg. A-8, infra)

This logic is somewhat akin to announcing to a criminal defendant that he has been convicted, in the middle of the execution.

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Goldberg v. Kelly (1970) 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed. 2d 287.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-

> examination. They have ancient roots. They find expression in the Sixth Amendment * * * This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny." Goldberg, supra 397 U.S. pg. 270, quoting Greene v. McElroy (1959) 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377.

Yet this important right is meaningless, if the lawyer was, as here, completely unaware that he would be conducting a cross-examination until the middle of the hearing, so that he could not be prepared to conduct a proper cross-examination, that would effectively show the truth. Counsel did not know what witness nor what evidence was critical, until after the bankruptcy judge announced her intentions to appoint a Chapter 11 trustee.

Yet, the Ninth Circuit concluded that:

> "The notice and hearing the judge afforded to Fukutomi were, as she determined, appropriate in the circumstances. One critical circumstance was that he was in possession of the estate, and another was that he was fraudulently looting it. As the judge explained, there was a threat to the estate if he could walk out the courtroom door and still be in control of it. Bankruptcy courts have traditionally limited hearings to what was necessary in the circumstances to decide disputed questions

> relating to appointment of a trustee. In re Casco Bay Lines, Inc., 17 B.R. 946, 950 (1st Cir., B.A.P. 1982); In re Inosophere Clubs, Inc. 113 B.R. 164, 167 (S.D.N.Y.1990). It appears that Fukutomi was in court, and his lawyer had a short recess to find out from him whether he could testify to anything useful."

This conclusion and the reasons in support, prove that due process, was denied. There was no notice and no meaningful hearing. In the solitude of chambers, a judge made a decision. The Bankruptcy Judge only gave an unsuspecting and unprepared attorney the opportunity to have the Judge's "mind changed." This is not due process. There was not a hearing wherein evidence and objections could be meaningfully presented and a prepared and meaningful cross-examination could be conducted of the only accusatory witness.

This Court long ago stated:

> "[M]anifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. * * * the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. * * * All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in

> explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding . . ." Interstate Commerce Commission v. Louisville and Nashville Railroad Company (1913) 227 U.S. 88, 93, 33 S.Ct. 185, 188, 57 L.Ed. 431.

The Ninth Circuit's conclusion that notice and hearing were appropriate is in direct conflict with the very concept of due process. If a party is entitled to due process, at the very least there must be a fair hearing, where evidence and argument can be meaningfully presented to an unbiased trier of fact. This cannot be done if counsel has no knowledge of the charges and evidence until after the hearing. The opinion is bad law, and stands contrary to this Court's prior decisions. If this opinion is allowed to stand, it will not serve the function of protecting a bankruptcy estate from wrongful acts by a debtor in possession, this can already be accomplished, with fair procedure. Instead, this opinion will only serve despotic bankruptcy judges, who now can do whatever they desire without the inconvenience of providing a fair hearing.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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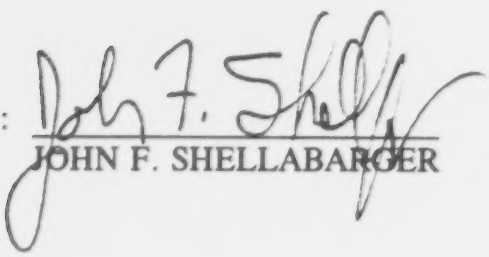
By: 
JOHN F. SHELLABARGER

FILED
JAN 24, 1996
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U.S. COURT OF APPEAL

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: BIBO, INC., a California Corporation, Debtor.	)	No. 94-56118 D.C. No. CV-93-04395-HLH
ROBERT FUKUTOMI, Appellant, v. UNITED STATES TRUSTEE, Appellee.	)	OPINION

Appeal from the United States
District Court
for the Central District of California

Harry L. Hupp, District Judge, Presiding
Robin L. Riblet, Bankruptcy Judge

Submitted December 15, 1995*
Pasadena, California

Filed January 24, 1996

Before: HUG, BEEZER, and KLEINFELD, Circuit Judges.

Opinion by Judge Kleinfeld

KLEINFELD, Circuit Judge:

We affirm the bankruptcy judge's sua sponte decision to appoint a Chapter 11 trustee.

Facts

Fukutomi owned Bibo, Inc. which owned an apartment complex. He operated the corporation as debtor in possession, after Bibo filed for relief under Chapter 11 of the Bankruptcy Code. Fukutomi also was a principal in at least one other apartment complex.

This case arose out of proceedings on Fukutomi's attempt to get bankruptcy court approval for his and his daughter's management fees. Creditors objected, so the court scheduled a hearing. The court consolidated the Bibo

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

hearing with a hearing in another bankruptcy case, In re El Prado, involving another of Fukutomi's apartment complexes. In El Prado, the court granted a creditors' motion for the appointment of a trustee, based on an examiner's report.

At the time of the hearing, there was no motion by the creditors for appointment of a trustee in the Bibo case. But the judge discovered in the papers a declaration which stated in the plainest terms, by a person with personal knowledge, that Fukutomi was siphoning money out of Bibo by means of a kickback scheme.

Mark Thomas, a property manager, submitted a sworn declaration establishing the kickback scheme. He said that the market price of managing something like the Bibo complex was 2.5% to 3% of gross monthly rents. He told Fukutomi he would provide full service real estate management for the complex, which would include accounting, for 2.5%. Fukutomi told him that 2.5% "simply would not work," and Thomas should bid the job for 5%, then pay Bibo 2.5% out of the 5%. Thomas prepared the management contract accordingly.

When a man named Don Louie, whose trust co-owned some of the lots, heard about this from Thomas, he was furious, and refused to sign off on the 5% fee for the lots Mr. Louie co-owned. Fukutomi told Mr. Thomas he should not have "blabbed to Don Louie about the deal."

The judge said at the hearing that she wondered why no one had moved for appointment of a trustee. In light of the judge's comment, Bibo's lawyer called Mr. Thomas as a witness (he was in the courtroom), and he testified and was

cross-examined. Mr. Thomas' testimony was consistent with his declaration and supplied additional detail. Fukutomi told Mr. Thomas he did not want the 2.5% that would go back to Fukutomi recited in the proposal which would have to be submitted to the court. Instead, Fukutomi wanted a side agreement. The 2.5% fee Mr. Thomas originally proposed would have covered all accounting services. Fukutomi bargained to charge Bibo twice that fee for essentially the same work.

After Mr. Thomas's testimony, the judge asked Bibo's attorney if he had any witnesses, and took a brief recess. After the recess, Bibo's attorney asked for a continuance before appointment of a trustee was decided, but the judge denied his request. She stated that her reason for denying the continuance was the "secretiveness, if not outright dishonesty" of the debtor in possession. Based on the evidence, she thought there was such mismanagement that "I want someone to take over all the assets of the debtor today. I do not want Mr. Fukutomi or Ms. Fukutomi to have access to any of the assets of this estate hereinafter from the moment they walk out the door until all this case is resolved one way or another." She then directed the U.S. Trustee to appoint a trustee to take over all assets of the debtor immediately.

That same day, the court issued a written order directing the U.S. Trustee to appoint a trustee. The court expressly found fraud:

> The Court further finds that the actions of Robert Fukutomi as principal of the debtor-in-possession have been in the best interests only of his own financial gain and that of his family members and not for the

> benefit of creditors. In particular, this Court relies upon the Declaration of Mark Thomas, filed with this Court on March 11, 1993 in connection with a relief from stay matter which was settled prior to the scheduled hearing thereon. Accordingly, the Court has not previously considered this Declaration. It is clear from Mr. Thomas' testimony that Robert Fukutomi has engaged in fraudulent behavior with reference to this estate by requiring a 50% kickback from Thomas' property management company. It should be noted that the employment of an independent management company was ordered by this Court in November 1992 to replace the prior management company which was also a Fukutomi-owned enterprise. It is abundantly clear to this Court that the interests of the creditors are not being protected by Robert Fukutomi's management of this debtor.

Bibo appealed to the district court, which affirmed.

Analysis

We review the district court's decision on appeal from bankruptcy court de novo. In re Daily, 47 F.3d 365, 367 (9th Cir. 1995). "We independently review the bankruptcy court's decision and do not give deference to the district court's determinations." In re Weisman, 5 F.3d 417, 419 (9th Cir. 1993). The bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed de novo. Id.

A. Sua sponte appointment.

Appellant argues that a bankruptcy court lacks authority to appoint a trustee in a Chapter 11 proceeding sua sponte. We disagree.

The statute plainly gives the bankruptcy judge authority to appoint a trustee sua sponte. A trustee may be appointed "on request of a party in interest or the United States trustee." 11 U.S.C. § 1104(a). The provision entitling a United States trustee or party to make such a request does not preclude the court from doing so sua sponte:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). Though we have not found circuit court authority on point, appointments sua sponte have been understood by bankruptcy courts as authorized. See In re Embrace Systems Corp., 178 B.R. 112 (Bankr. W.D. Mich. 1995); Matter or Mother Hubbard, Inc., 152 B.R. 189, 197 (Bankr. W.D. Mich. 1993).

B. Factual justification.

Appellant argues that there was no evidence which would justify sua sponte appointment of a trustee in this case.

The Code says a trustee "shall" be appointed: (1) "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management," or (2) if appointment is "in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a). The judge's well-founded findings established fraud, dishonesty, gross mismanagement, and that appointment was in the interests of the estate.

Appellant points out that the attorney for the creditors' committee did not request appointment of a trustee. At least one other creditor's attorney, however, requested that the court "on its own appoint a trustee in this case." Even without such a request, the court is empowered to sua sponte appoint a trustee in order to protect the estate.

The bankruptcy judge, not the attorney for the creditors' committee, judges whether to appoint a trustee. The bankruptcy judge had good reasons for doing so, precisely in accord with what Congress listed as appropriate reasons. The fraud demonstrated here elicited action from the judge even though the creditors' committee attorney had not raised the issue. No doubt it was because of situations like this, where appointment is highly desirable to prevent looting of the estate, and the judge is the first to comprehend its necessity, that Congress gave bankruptcy judges the power to do so.

C. Due process.

Fukutomi claims that he was not given adequate notice or opportunity to be heard on the issue of appointment of a trustee. Although Fukutomi says the bankruptcy court knew

of the allegations in the Thomas Declaration months before the hearing, the judge stated that she did not read the declaration until the day of the hearing.

The statute codifies the proposition that a trustee may be appointed "after notice and a hearing." 11 U.S.C. § 1104(a). The rules require "reasonable" notice and opportunity for hearing. Fed. R. Bank. P. 9014. The Code defines the term "after notice and a hearing" as meaning such notice and hearing as is appropriate in the circumstances:

> (1) "after notice and a hearing", or similar phrase -- (A) meaning after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances

11 U.S.C. § 102(1).

Fukutomi received notice, because the judge stated what she was considering doing, and he received a hearing. He was given an opportunity to cross examine Thomas, whose allegations were the basis for the appointment. We do not have occasion to decide here whether a trustee could have been appointed without a hearing.

The notice and hearing the judge afforded to Fukutomi were, as she determined, appropriate in the circumstances. One critical circumstance was that he was in possession of the estate, and another was that he was fraudulently looting it. As the judge explained, there was a threat to the estate if he could walk out the courtroom door and still be in control of it. Bankruptcy courts have traditionally limited hearings to

what was necessary in the circumstances to decide disputed questions related to appointment of a trustee. In re Casco Lines, Inc., 17 B.R. 946, 950 (1st Cir., B.A.P. 1982); In re Ionosphere Clubs, Inc., 113 B.R. 164, 167 (S.D.N.Y. 1990). It appears that Fukutomi was in court, and his lawyer had a short recess to find out from him whether he could testify to anything useful.

Conclusion

The bankruptcy court had authority to act sua sponte to appoint a Chapter 11 trustee, did so for reasons denoted in the statute, and had ample basis for her findings of facts supporting those reasons.

AFFIRMED.

COUNSELING LISTING

John F. Shellabarger, McIntosh & Patison, Santa Ana, California, for the appellants.

Paul F. Schimley, Anderson, McPharlin & Conners, Los Angeles, California, for the appellee.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes - General

Case No. CV 93-4395 HLH Date June 20, 1994

Title In re Bibo, Inc.

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DOCKET ENTRY

(HAND WRITTEN) ENTER JS-6

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PRESENT:

Hon. HARRY L. HUPP, Judge

Milli Borgarding

(Handwritten-Illegible)

Deputy Clerk

(Unintelligible Signature)

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

~~S. David Schwartz~~

(Handwritten)

J. Shellenger✓

ATTORNEYS PRESENT FOR DEFENDANTS:

Robert Fukutomi

(Handwritten)

R. Cohen✓

R. Schimeley✓

C. Burch✓

ENTERED
CLERK, U.S. DISTRICT COURT
JUNE 22, 1994
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

(Crossed out)
ENTERED
CLERK, U.S. D*(Unintelligible)*
JUNE 23, 1994
CENTRAL DISTRICT OF CALIFORNIA
BY_____ DEPUTY

PROCEEDINGS: Bankruptcy Appeal

ORDER (also, if applicable, finding and memorandum opinion):

The orders of the Bankruptcy Court appointing a Trustee in each case (No. 93-4394 and No. 93-4395) are affirmed.

The court ordered the two matters consolidated for purposes of briefing and argument, even though separate orders are being entered in each case. All issues will be discussed in each order even though certain issues affect only one or the other of the cases. The matters should be heard and decided together since the debtor in No. 93-4395, Bibo, Inc., is the general partner of the limited partnership debtor in No. 93-4394, El Prado de Oxnard. Certain of the activities in each case need to be considered since such affect the

operation of the debtor in the other case.

The first question is whether Mr. Fukutomi has standing to appeal. He is the sole shareholder of Bibo, the general partner, and was the person in day to day operation of the general partner and of the limited partnership. Relying on Wonderbowl 9Cir'75 515 F2d 18, this court previously held in its order of 1/31/94 on motion to discuss the appeal that Mr. Fukutomi has standing to appeal in the circumstances of this case. The court adheres to that determination.

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In each case, on 5/26/93 the Bankruptcy Court appointed a Trustee to take over management from the debtor in possession, essentially Mr. Fukutomi operating through Bibo, In No. 93-4394 (El Prado) a motion by the secured creditors for appointment of a trustee had been pending since February, 1993, and had been continued several times to 5/26/93. The bankruptcy judge had in the meantime appointed an Examiner in the El Prado matter to advise her as to whether a trustee should be appointed. The examiner's report had emphatically advised the appointment of a trustee, concluding from numerous facts and events recited in the report that El Prado "has been used as a vehicle to support Bibo's and Robert Fukutomi's separate interests to the point where creditor interests may be jeopardized." Without setting them forth here, the facts and events recited support the conclusion of the Examiner. In addition, in the Bibo estate (where there had been no motion to appoint a trustee), the bankruptcy judge was in receipt of testimony (tested and unaffected by cross-examination by Mr. Fukutomi's attorney) that the property manager had been requested by Mr. Fukutomi to withdraw his bid and substitute a larger bid with the difference to be a kick-back to Mr. Fukutomi, apparently to pay for the accounting to be done by Mr. Fukutomi's controlled company. With all of this background, the bankruptcy judge appointed a trustee in each case. The trustee in the Bibo case was appointed sua sponte and the trustee in the El Prado case on the motion of the secured creditors.

The bankruptcy judge made findings by reference to

the report of the examiner and the testimony of the property manager. These findings are reviewed under the "clearly erroneous" test, and they are not clearly erroneous or erroneous in any other way. The test for appointment of a trustee is whether there was "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor" or that the "appointment is in the interests of the creditors." The bankruptcy court held that his management was good and not inimical to the interests of the creditors. This court does not make that determination; the bankruptcy court does. There is a basis for the determination made.

Appellant argues that the bankruptcy court could not make the appointment of the trustee in the Bibo case on its own motion. The court disagrees. §105 (a) provides a broad grant of power to the bankruptcy judge, including the following: "No provision of this title providing for the raising of an issue by a party of interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." The court construes that language as providing authority to appoint a trustee sua sponte when the facts justify the same, as they do here. Here, obviously the fate of the limited partnership and its general partner are tied together, and the appointment of a trustee for the limited partnership would seem also to make the appointment of one of its general partner desirable, particularly in view of the kick-back episode.

Appellees contend that the appointment of a trustee is not an appealable order. However, the court accepts the decision of the BAP in In re Strowski 9CirBAP'86 96 BR

1007 as authority to the contrary.

The orders appointing trustees in each case are affirmed.

AL934394.620 cc: Judge Riblet

FILED
MAY 26, 1993
Clerk US Bankruptcy Court
Central District of California
By_____Deputy Clerk

ENTERED
MAY 26, 1993
Clerk US Bankruptcy Court
Central District of California
By *(Initials)* Deputy Clerk

UNITED STATED BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	)	CASE NO. ND92-70898 RR
BIBO, INC.,	)	
	)	Chapter 11
Debtor(s).	)	
	)	ORDER DIRECTING UNITED STATES TRUSTEE TO APPOINT CHAPTER 11 TRUSTEE
	)	
	)	Date: May 26, 1993
	)	Time: 2:00 p.m.
	)	Place: 222 E. Carrillo St. Room 104, Santa Barbara, CA

On for hearing on May 26, 1993 at 2:00 p.m. before the undersigned United States Bankruptcy Judge there came on for hearing the request of principals of the debtor corporation, Robert Fukutomi and Amy Fukutomi, for compensation at the expense of this estate. Various testamentary and documentary evidence was filed in support of and in opposition to these requests. Based upon the evidence provided this Court finds that granting any compensation to principals of the debtor would be inappropriate.

The Court further finds that the actions of Robert Fukutomi as principal of the debtor-in-possession have been in the best interests only of his own financial gain and that of his family members and not for the benefit of creditors. In particular, this Court relies upon the Declaration of Mark Thomas, filed with this Court on March 11, 1993 in connection with a relief from stay matter which was settled prior to the scheduled hearing thereon. Accordingly, the Court has not previously considered this Declaration. It is clear from Mr. Thomas's testimony that Robert Fukutomi has engaged in fraudulent behavior with reference to this estate by requiring a 50% kickback from Thomas' property management company. It should be noted that the employment of an independent management company was ordered by this Court in November 1992 to replace the prior management company which was also a Fukutomi-owned enterprise. It is abundantly clear to this Court that the interests of creditors are not being promoted by Robert Fukutomi's management of this debtor. The Court's further findings are contained in the record. According, it is hereby

ORDERED that the United States Trustee is hereby directed to appoint a chapter 11 trustee immediately to take over the management and control of all assets of this estate.

Dated: May 26, 1993 *(Signature)*
Robin L. Riblet
U.S. Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that copies of the ORDER DIRECTING UNITED STATES TRUSTEE TO APPOINT CHAPTER 11 TRUSTEE were mailed on *(Stamped MAY 26, 1993)* to the following parties and other parties-in-interest listed below:

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Terrence V. Ponsford, Esquire
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Mark A. Thomas
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/S/